KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In response to our remand of Mr. and Mrs. Gonzalez's cases, the district court did exactly what we asked it to do: it carefully balanced the search's intrusion on the individuals' Fourth Amendment interests against the search's promotion of legitimate governmental interests.[1] The district court ultimately determined that the random drug testing was unreasonable as applied to these two individuals, and thus violated their Fourth Amendment rights. The question is close, but I would accept the measured judgment of the district court.

As a dispatcher for the MTA, Mrs. Gonzalez had no lowered

[1] As we instructed, the district court considered the following factors: "(1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; (3) the immediacy of the government concern and the efficacy of the search for meeting it." Gonzalez v. Metro. Transp. Auth., 174 F.3d 1016, 1021-22 (9th Cir. 1999) (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 654-64 (1995)).

expectation of privacy, and her position could hardly be called "safety-sensitive." Buses do not fly, so even though she may give directions, there is not the kind of safety risk that there would be if she were an air traffic controller. She sits in a room with other people and answers phone calls. As for receiving calls, only three or four times in 17 years did she have to respond to any kind of emergency. When an emergency did occur, her sole responsibility was to call the police or ambulance. In this function, her work is no more safety sensitive than that of a desk clerk at a hotel or a receptionist at an office. Additionally, she worked in a room full of other dispatchers who would likely see the effects of drug abuse and be able to step in during an emergency, if needed.

Although a closer case, Mr. Gonzalez's job as a bus driver supervisor similarly lacks the kind of impact on safety needed to justify the intrusion of a random drug test. He sits at a desk and works with paper, as we do. When he drives MTA vehicles, he does so in order to get to job sites or test equipment, not to carry passengers. His job description calls for him to be prepared to drive a bus under a variety of circumstances, but he has almost never been required to do so during his lengthy career with the MTA. As a

practical matter, his job is no more safety sensitive than the general run of administrative jobs.

We have upheld random drug testing of employees who *may* be called upon to perform safety-sensitive tasks, despite a lack of frequency, but only where the level of dangerousness was extraordinarily high. In International Brotherhood of Electrical Workers, Local 1245 v. United States Nuclear Regulatory Commission, we upheld drug testing of all clerical workers at a nuclear power plant based on the workers' diminished expectation of privacy in a heavily-regulated industry, the catastrophic nature of accidents that could occur at a nuclear plant, and "our inability to distinguish between those clerical workers who pose a real threat to public safety and those who do not."[2] Likewise, in AFGE Local 1533 v. Cheney, we held that engineers working for the Navy who were subject to random testing had a diminished expectation of privacy because of the intrusion they faced in the extensive background check required to get top secret clearance.[3] This lowered privacy interest justified an intrusion even where the engineers were

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[2] 966 F.2d 521, 525-26 (9th Cir. 1992).

[3] 944 F.2d 503, 505, 507 (9th Cir. 1991).

unlikely to access top secret information. We held that "a person with a top secret clearance generates sufficiently grave potential risk to national security to make the decision to conduct random urinalysis testing reasonable *regardless of any other attendant circumstances*."[4]

These cases do not mean, however, that infrequency is irrelevant in every case; it is merely one consideration in the balancing test. The unlikelihood that the Gonzalezes will be required to do something that impacts public safety is particularly relevant here for the lack of other reasons justifying an intrusion into their privacy. Although the MTA has a legitimate interest in testing employees in safety-sensitive positions, we must guard against so lax an interpretation of "safety sensitive" that *all* employees of all kinds can, by reasons of expansive but largely imaginary job descriptions, be required to urinate for testing. I agree with the district court that the record demonstrates that *these particular* MTA employees are not situated to pose a substantial immediate threat to public safety. Bus dispatchers and administrators pose no risk of nuclear meltdowns or national intelligence breach.

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[4] Id. at 506 (citations omitted) (emphasis in original).

Like the district court below, I would hold that the expectation of privacy that the Gonzalezes have in their jobs is not outweighed by the slight impact their jobs could have on public safety, and that random drug testing violates their Fourth Amendment rights.